Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon New England, Inc.,	)	
Verizon Delaware Inc., Bell Atlantic	)	
Communications, Inc. (d/b/a Verizon Long	)	
Distance), NYNEX Long Distance	)	WC Docket No. 02-157
Company (d/b/a Verizon Enterprise Solutions),	)	
Verizon Global Networks, Inc., and Verizon	)	
Select Services, Inc., for Authorization to Provide	)	
In-Region, InterLATA Services in	)	
New Hampshire and Delaware	)	

REPLY COMMENTS OF FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A BAYRING COMMUNICATIONS

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SUMMARY

Section 271 authority was intended to provide an incentive for regional Bell Operating Companies ("RBOCs") such as Verizon to open their markets to competition. Somehow the process got inverted in New Hampshire. As New Hampshire Public Utilities Commission ("NH PUC") Commissioner Nancy Brockway lamented in her Deliberations Statement, "the 'carrot' of long distance entry, which was held out by the Telecommunications Act of 1996 as the prize that would incent the incumbent Bell Telephone Companies to open up their local systems to competition, is not sweet enough in New Hampshire to sway this giant corporation."[1] Instead, Verizon threatened to put New Hampshire at "the back of list" of states in its region or to withdraw from the market itself, if the NH PUC did not support its Section 271 application. While the NH PUC initially put up a brave front in the face of such threats, such pressure combined with that from the state legislature, forced it to capitulate. Commissioner Brockway noted the NH PUC lacked the "authority" to achieve "the full range of changes to Verizon's treatment of local exchange competitors that we originally identified as necessary in order to protect local competition upon Verizon's entry into the long distance market."[2]

Verizon attempts to downplay the actions it took in response to the NH PUC's March 1, 2002 determination that Verizon still needed to take substantial action to come into compliance with the requirements of Section 271. The record, however, speaks for itself. The language of Verizon's advertising campaign, the four hearings before the NH Legislature where the Staff of the PUC was asked to defend its actions, the tenor and language of the letters from the legislature to the PUC directing the PUC to change course, the deliberations statements of two of the Commissioners, and the capitulation of the NH PUC on the one issue it found most crucial –

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1 WC 02-157, Comments of BayRing Communications, Appendix A, Tab 15.

2 *Id.*

loop rates – all demonstrate that the NH PUC's June 14, 2002 recommendation did not reflect the actual findings of the NH PUC.

This Commission, however, does not have to rule upon the propriety of Verizon's actions, although it should send a clear message to Verizon that such abuse of the Section 271 process will not be tolerated.[3] The Commission must simply determine whether to accord deference to the March 1st findings of the NH PUC or the June 14th set of findings. It is clear that the March 1st findings are the findings most supported by the record of the state proceeding. It is clear that the NH PUC correctly determined that, among other things, Verizon's UNE rates in New Hampshire were not TELRIC-compliant and effected a price squeeze that was not only impeding, but precluding, competition. The NH PUC on March 1st provided Verizon a roadmap to Section 271 authority. Verizon refused to embark on the journey. Until it does, it should be denied the prize at the end of the road.

[3] If not, the unprecedented actions of Verizon to force a state commission to acquiesce will become commonplace. Section 271 applicants will simply commit to the bare minimum in a state proceeding and challenge any state commission attempts to go beyond that.

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REPLY COMMENTS OF
FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A
BAYRING COMMUNICATIONS

Freedom Ring Communications, L.L.C. d/b/a BayRing Communications ("BayRing") submits these reply comments concerning the above-captioned Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware filed June 27, 2002 ("Application").[4]

[4] Comments Requested on Verizon's Joint Application for Authorization to Provide In-Region, InterLATA Service in Delaware and New Hampshire, Public Notice, WC Docket No. 02-157, DA 02-1497, released June 27, 2002. BayRing takes no position on Verizon's Application for Section 271 authority in Delaware.

I. VERIZON'S UNE RATES ARE NOT TELRIC-COMPLIANT (CHECKLIST ITEM 2) AND ARE NOT IN THE PUBLIC INTEREST

In its Comments, BayRing detailed how Verizon's rates for unbundled network elements ("UNEs") in New Hampshire were not TELRIC-compliant,[5] and also effected a price squeeze that precluded competitive entry in the residential market in New Hampshire.[6] The Department of Justice, in evaluating Verizon's application for Section 271 authority in New Hampshire, observed:

> [t]he low levels of CLEC penetration of residential markets in New Hampshire, and, in particular, the lack of entry by means of the UNE-Platform, may reflect the higher pricing that was in effect for most of the period preceding this application . . . .[7]

The Department of Justice urged this Commission to "look carefully at these comments [of competitors in New Hampshire] in determining whether Verizon's prices are cost-based."[8]

BayRing echoes the determination of the Department of Justice that commenters' concerns about UNE rates in New Hampshire warrants careful scrutiny by this Commission. BayRing would like, however, to address one misconception that the Department of Justice may have operated under in its evaluation, *i.e.*, that the new UNE rates adopted by the New Hampshire Public Utilities Commission ("NH PUC") in June of this year may somehow rectify the problems of UNE pricing in New Hampshire. Verizon's UNE reductions were very limited. Loop rates were reduced to $25, but only in zone 3, which comprises rural areas. Loop rates in zones 1 and 2 were untouched. Switching rates were reduced by 17%, and there were reductions

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5 *See* WC 02-157, Comments of Freedom Ring Communications, L.L.C. d/b/a BayRing Communications at 11-27 (July 17, 2002) ("*BayRing Comments*"). BayRing would like to take this opportunity to correct a typo in its Comments. In Section IV.B. of the Comments on page 55, the sentence should read "The record established in the New Hampshire proceeding shows that, in the vast majority of the state, the UNE rates do **not** provide for a "sufficient profit for an efficient competitor" to serve residential customers." The "not" was inadvertently omitted from the sentence.

6 *BayRing Comments* at 53-69.

7 WC 02-157, Evaluation of the United States Department of Justice at 10 (Aug. 1, 2002) ("*DoJ Evaluation*").

in DS-1 loop rates and DUF rates. As BayRing demonstrated in its Comments, even with the loop rate reductions, Verizon's loop rates fall outside the range that a reasonable application of TELRIC principles would produce based on a benchmark comparison to the loop rates in Vermont, the state that is the most appropriate comparison to New Hampshire under this Commission's benchmarking standard.[9] AT&T has demonstrated that Verizon's switching rates still do not satisfy the Commission's benchmarking standard.[10] BayRing also conducted an updated price squeeze analysis using Verizon's new rural loop rates and determined that the rate reduction did nothing to mitigate the price squeeze.[11] In fact, although its purchases of UNEs for residential service are very small, since BayRing appears to be the largest supplier of residential service through use of UNEs in New Hampshire,[12] BayRing is in the best position to evaluate the effects of the rate reductions. BayRing unequivocally demonstrated that the reductions have little impact on its costs or the costs of any other facilities-based provider serving customers with Verizon's loops. Thus, the rate reductions do not ameliorate the price squeeze nor do they render Verizon's rates TELRIC-compliant.

In face of the bleak prospects for competition effected by Verizon's high UNE rates, Verizon has the audacity to propose, via a letter that has been made part of the record in this proceeding, that the Commission make significant modifications to TELRIC principles through the Section 271 process.[13] Specifically, Verizon seeks clarification and/or modification of TELRIC principles in regard to cost of capital, depreciation lives, appropriate technology mix,

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8 *DoJ Evaluation* at 10.

9 *BayRing Comments* at 23-24.

10 WC 02-157, Comments of AT&T Corporation at 7 (July 17, 2002).

11 *BayRing Comments* at 60-61.

12 *See BayRing Comments* at 63.

13 WC Docket No. 02-157, July 18, 2002 *Ex Parte* Letter from Richard T. Ellis, Director, Federal Affairs, Verizon to Marlene H. Dortch, Secretary, FCC, *introducing into record*, CC Docket No. 01-338, July 16, 2002 Letter from William P. Barr, Executive Vice President and General Counsel, Verizon to the Honorable Michael Powell ("*Barr Letter*").

fill factors, non-recurring charges, and to limit the "forward-looking" period of TELRIC to three to five years.[14] Verizon suggests that the Commission can use, among other things, ongoing Section 271 proceedings (presumably including this one) to address these "fundamental pricing" issues.[15]

As the Commission has noted, however, Section 271 proceedings would be a highly inappropriate forum for the consideration of such issues. The Commission has observed:

> despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors – disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.[16] Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.[17]

Verizon's proposal highlights the wisdom of the Commission's approach. Verizon's proposals would amount to "radical reform" of the Commission's TELRIC principles and would require this Commission to perform an "extensive cost analysis" "input-by-input."[18] Such an undertaking would be a monumental task even under no pressure of a deadline; the 90 day deadline makes it all the more infeasible.

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14 *Id.*

15 *Barr Letter* at p. 5.

16 *See American Tel. and Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

17 *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, ¶ 19 (Jan. 22, 2001).

18 CC Docket No. 01-338, July 26, 2002 Letter from James W. Cicconi, General Counsel and Executive Vice President, Law & Government Affairs, AT&T to the Honorable Michael Powell ("*AT&T Letter*").

The Commission should not give any consideration to such proposals, particularly proposals that come in the form of unsupported arguments in letters filed nearly a month into a three-month proceeding. BayRing does not have the time and resources to conduct a point-by-point rebuttal of Verizon's letter, but does concur in AT&T's assessment that Verizon is improperly asking this Commission to "use the Supreme Court's unqualified endorsement of the Commission's TELRIC rules as an opportunity to abandon them in all but name."[19] BayRing also agrees with AT&T that the each proposal would "directly violate core TELRIC principles" as determined by state commissions, courts, and this Commission.[20] Verizon's letter is an unabashed attempt to get this Commission to countenance higher rates than the existing TELRIC methodology will allow. Verizon is not only seeking to lower the bar to Section 271 approval, but it is seeking to do so after the record developed at the state level has been closed, and review at the Commission has commenced. If Verizon wants to have new law applied in the evaluation of its application, then the Commission should dismiss Verizon's application, allow parties to comment before the state commission on Verizon's proposal, and, if any modifications are made, then have the state commission reevaluate Verizon's rates in light of such modifications. Unless these procedural protections are implemented, there is no place for Verizon's proposals in the record of this proceeding.

In regard to cost of capital, which has the most relevance to this proceeding at hand, the most relevant factor for this Commission's consideration is that the NH PUC, at the conclusion of a proceeding which Verizon itself terms "comprehensive," found an 8.42% cost of capital to best reflect updated data and is "reasonable in today's market."[21] This is the cost of capital that

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19 *AT&T Letter* at 1.
20 *Id.*
21 *BayRing Comments* at 16.

the NH PUC initially deemed most appropriate for Verizon to use,[22] and the Commission should require use of this cost of capital in New Hampshire.

II. THE MARCH 1, 2002 FINDINGS OF THE NH PUC SHOULD BE ACCORDED MAXIMUM DEFERENCE

BayRing noted in its Comments that the NH PUC's June 14, 2002 finding that Verizon's acceptance of diluted conditions satisfied Section 271 requirements was, among other things, the product of improper legislative pressure that undercut its validity. BayRing argued that the March 1, 2002 findings of the NH PUC, since they were untainted by legislative or political pressure, were the findings to which this Commission should accord "maximum deference."[23] Pursuant to Staff's request, Verizon has filed an *ex parte* letter contending that: i) the NH PUC's recommendation was not tainted by improper legislative pressure; ii) the Commission should not delve into procedural state law issues; and iii) even if the improper legislative pressure cases apply, under the cases, there is no reason to question the validity of the NH PUC's recommendation.[24] BayRing will first address the procedural issue and then turn to the substantive issues.

A. This Commission Does Not Need to Delve Into State Law Issues To Address the Procedural Infirmities of the NH PUC's Ultimate Recommendation

Verizon seeks to complicate what is an essentially very simple issue, and ironically is an issue that Verizon itself has raised in this proceeding. The issue is what deference should be accorded to the NH PUC's findings in its state proceeding. Verizon contends that the June 14, 2002 findings of the NH PUC should be accorded "maximum deference."[25] Thus, for this Commission to evaluate Verizon's claim that the June 14th findings must be given "maximum

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22 The NH PUC was forced to back down from this determination, however. *BayRing Comments* at 16.

23 *BayRing Comments* at 2-11.

24 WC Docket No. 02-157, August 5, 2002 *Ex Parte* Letter from Richard T. Ellis, Director, Federal Affairs, Verizon to Marlene H. Dortch, Secretary, FCC.

deference" it will need to determine if the decision is supported by the record of the state proceeding or whether it was the product of external pressures not relevant to Section 271 considerations. BayRing disputes Verizon's contention that the June 14th determinations be given "maximum deference," given the improper legislative and political pressure that was brought to bear on the NH PUC.[26] BayRing argues that maximum deference should instead be accorded to the NH PUC's March 1, 2002 findings. There is no dispute that the NH PUC made two sets of findings in its state proceedings, and the question is which set of findings to which the Commission should accord deference.

The Commission has noted that:

> [b]ecause the Act does not prescribe any standard for the consideration of a state commission's verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to determine the weight to accord the state commission's verification. The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the FCC's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.[27]

The Commission does not have to make legal judgments as to whether the NH PUC abided by state law and regulations and it does not need to interpret state law or consider principles of comity to make a determination as to which set of findings it should accord more deference. Instead, the Commission has to simply examine the factual record and determine which determination is better supported by the factual record. It is clear given both the factual record and the statements of the Commissioners that the NH PUC's March 1, 2002 ruling was more supported by the factual record, and that the NH PUC, in

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25 Verizon Brief at 13-14.

26 *BayRing Comments* at 3-11.

27 *Application of Verizon New Jersey, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in New Jersey,* CC Docket No. 01-347, Memorandum Opinion and Order, FCC 02-189, Appendix C, ¶ 2 (June 24, 2002).

its June 14th ruling, was forced to deviate from this record given the pressure imposed by Verizon and the state legislature. The language of two of the three commissioners could not be more unequivocal that their ultimate findings were not their desired findings. Commissioner Brockway referenced "a mandate to act without the complete authority to achieve the results necessary."[28] She noted:

> But we lack the authority to require today, over Verizon's persistent objections, the full range of changes to Verizon's treatment of local exchange competitors that we originally identified as necessary in order to protect local competition upon Verizon's entry into the long distance market. Verizon refused to make certain of the improvements we saw as important to safeguard local competition once Verizon was freed to enter the long distance market. It has refused to lower its wholesale access rates for competitors and internet providers to those in nearby states. It has appealed to the public and to the legislature, with an incessant campaign for us to grant it long distance entry, meanwhile making only modest concessions to our authority and our policy determinations.[29]

Commissioner Geiger concurred in the statement of Commissioner Brockway.[30] Thus, not only is it clear that the factual record supported the NH PUC's March 1, 2002 determination, it is clear that at least two of the commissioners noted they were succumbing to the legislative and political pressure Verizon brought to bear. The challenges to the propriety of the NH PUC's findings of June 14, 2002 come not from BayRing, but from the mouths of the Commissioners themselves.

Verizon contends that BayRing is asking the Commission to embark on an unprecedented expansion of the Section 271 review process.[31] There is no expansion of the process. With every application, the Commission must determine what weight to accord a state commission determination. The only thing unprecedented is the pressure Verizon brought to bear on the NH PUC to impede the imposition of pro-competitive conditions and the fact that this pressure led to

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28 WC 02-157, Comments of BayRing Communications, Appendix A, Tab 15.
29 *Id.*
30 *Id.*
31 *Verizon August 5th Letter* at 7.

the issuance of a second set of state commission findings that substantially deviated from the first set of findings. This Commission has to determine which set to which to accord deference. It is clear from the factual record, and the statements of the Commissioners, that the March 1, 2002 findings must be accorded maximum deference.

B. There Clearly Was Improper Legislative Pressure

Verizon's contention that BayRing's allegation that the NH PUC's recommendation was tainted by improper legislative pressure is false is clearly undercut by the statements of Commissioner Brockway. When a decision-maker explicitly states that his/her decision is the product of appeals to the legislature, and that his/her decision would have been different if not for the pressure, there can be little doubt that improper legislative pressure was brought to bear upon the decision.

Verizon attempts to portray the NH PUC's modified findings as the product of "extensive negotiations" and "substantial compromises" on the part of Verizon.[32] The "negotiations," however, would not have been needed save for Verizon's intransigent refusal to accept the NH PUC's conditions. As Commissioner Brockway noted, "Verizon refused to make certain of the improvements we saw as important to safeguard local competition . . . ."[33] It is telling that the NH PUC's directive to "negotiate" came a mere five days after the legislative hearings were initiated.[34] As far as "substantial compromise" is concerned, Verizon refused to budge on the one issue that most concerned the Commissioners, *i.e.,* loop rates. Commissioner Geiger, in her deliberations statement, noted her continuing concern over the "stale" loop rates that were higher

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32 *Verizon August 5th Letter* at 2.

33 WC 02-157, Comments of BayRing Communications, Appendix A, Tab 15.

34 The NH PUC's directive to negotiate was issued on April 10, 2002 which was five days after the first hearing and nearly a month after Verizon's March 15th letter stating that it would not agree to numerous conditions. The NH PUC's statement that Verizon "made certain reasonable points" also came five days after the first hearing.

than those in neighboring states and were "impeding competition."[35] Commissioner Geiger placed much faith in a new proceeding that the NH PUC was initiating, but this proceeding will only address cost of capital and, thus, will not address merger savings or any of the other TELRIC errors BayRing noted in its Comments.

Staff, in its May 5th Report and Recommendation, continued to call for the 8.42% cost of capital and merger savings reductions to be applied to loop rates, but Verizon would not compromise on this.[36] As Commissioner Brockway noted, Verizon "has made it clear on numerous occasions that it will not make these improvements unless ordered to do so" and that it would continue to seek to avert such an order.[37] Thus, the process was not one of negotiation and compromise on the part of Verizon, but a situation where Verizon dictated the terms of the "compromise" and the NH PUC was left little choice but to go along.

Verizon also attempts to minimize the import of its advertising campaign by contending that it was only four ads and only cost $5,000. In a state the size of New Hampshire, however, one can easily get the desired effect with a few well-placed ads, and it is clear the ads were effective, as they generated a flow of letters to the NH PUC.[38] BayRing does not dispute Verizon's right to commercial free speech. It is clear, however, that the ads were designed to heighten the pressure on the NH PUC. The issue before this Commission is not whether the Verizon advertising campaign was improper, but what deference to accord to the PUC's June 14th findings – an issue presented in the first instance by Verizon itself. The crux of the ad campaign was that New Hampshire was harmed because the NH PUC had not yet supported Verizon's 271 application, while neighboring state commissions had given such support. The

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35 *Id.*

36 *See* VZ App. B-NH, Tab 27 at 2.

37 WC 02-157, Comments of BayRing Communications, Appendix A, Tab 15.

advertising campaign urged the NH PUC to "help give consumers what New York, Massachusetts, and other Northeast states already have—lower rates . . . and great long distance service from Verizon," and sought to stimulate a flow of letters to the NH PUC clamoring for Verizon entry into long distance.[39] Once again, the Commission does not need to evaluate the merits of Verizon's campaign. The Commission must simply determine if the pressure brought to bear on the Commission undermined the validity of their ultimate findings. BayRing has demonstrated that it did.

In regard to the hearings, Verizon attempts to portray the hearings as involving "presentations by all parties to the PUC's proceedings regarding the issues in that proceeding."[40] Verizon attempts to defuse the import of Representative Maxfield's assertion that he "did not care about the CLECs" by suggesting that this indicated his desire to hear from Staff "rather than CLECs, during that particular hearing, in which the Committee was interested in a status report on the current state of negotiations."[41] This contention is undercut by the fact that both Verizon and Staff were allowed to testify at that hearing, and CLECs were not. If Representative Maxfield's desire was simply to hear from the Staff he would not have allowed Verizon the opportunity to testify at the hearing. In fact, Verizon and Staff were allowed to testify at all four of the hearings, and CLECs were given the opportunity to testify at only one.[42] The one hearing where CLECs were allowed to testify, Verizon was given an opportunity to immediately respond. Clearly there was no even-handed approach to these hearings, nor was there any intention of such an approach.

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38 WC 02-157, Comments of BayRing Communications, Declaration of Benjamin Thayer at ¶ 5 (July 17, 2002).
39 Thayer Declaration at ¶ 5.
40 *Verizon August 5th Letter* at 5.
41 *Id.* at 5, n. 9.
42 *See Verizon August 5th Letter* at 5.

Thus, this Commission would have to suspend disbelief to find that no improper pressure was brought to bear on the Commission. When one Commissioner candidly admits such pressure framed her decision, and another Commissioner concurs in this statement, there is no question that improper pressure was brought to bear.

C. The Case Law Supports A Finding of Improper Legislative Pressure

Verizon contends that even if the case law BayRing cites were applicable there would be no objection to the validity of the NH PUC recommendation.[43] Once again, it should be emphasized that the Commission does not need to make a finding of improper legislative pressure to determine that the March 1st determination should be accorded more weight. The Commission must simply determine which set of findings is more credible, given the factual record. If the Commission finds there was pressure on the NH PUC, and this pressure tainted the validity of the June 14th set of findings, then the Commission should accord deference to the March 1st findings. It is clear, however, that not only was their inordinate legislative pressure on the NH PUC, but that this pressure was improper under the case law.

Verizon first contends that the NH 271 state proceeding was a non-adjudicative proceeding, and therefore it was appropriate for the NH PUC to consider the views of the legislature.[44] Verizon cites to the March 1, 2002 letter of the Commission stating that the inquiry was "not formally a 'contested case' and for this reason was conducted as a non-adjudicative process."[45] Verizon fails to note that the NH PUC went on to add that "[h]owever, the proceeding had many of the elements of such a case, and laid a firm foundation for our recommendations to the FCC."[46] Thus, the proceeding was exactly the type of proceeding that is

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43 *Verizon August 5th Letter* at 9.
44 *Verizon August 5th Letter* at 10.
45 *Verizon August 5th Letter* at 10, n. 13.
46 VZ App. B-NH, Tab 24 at 1.

neither purely legislative nor purely adjudicative, such as the one the D.C. Circuit addressed in *D.C. Federation of Civic Ass'ns v. Volpe.* In that case, the D.C. Circuit concluded that "the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher" and remanded the case to the Secretary of Transportation with instructions "to make new determinations based strictly on the merits and completely without regard to any considerations not made relevant in the applicable statutes."[47]

Verizon suggests that even if there was legislative pressure, it was not inappropriate because in the case of *ATX v. U.S. Dept. of Transp.,* the D.C. Circuit rejected claims of improper influence even though members of Congress sent at least 60 letters to the agency, introduced legislation, and testified at the administrative hearing.[48] As the D.C. Circuit noted in that case:

> There is no reason for us to *infer* that the letters influenced his decision inasmuch as he did not reverse the ALJ's recommendations nor was the merits decision a close one on the record. If the decision maker were suddenly to reverse course or reach a weakly-supported decision, by contrast, we might infer that pressure did influence the final decision.[49]

Here the Commissioners did in fact "reverse course" after the legislative pressure, and one Commissioner, in a statement concurred in by another Commissioner, specifically referenced the legislative pressure in explaining the NH PUC's change of position. As the Fifth Circuit has held:

> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality . . . .[50]

Thus, while in *ATX,* there was "no evidence that the legislative activity *actually* affected the outcome on the merits," and the decisions of the agency did not mention the legislative

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47 459 F. 2d 1231, 1246 (D.C. Cir.), *cert. denied,* 92 S.Ct. 1290 (1972).

48 *Verizon August 5th Letter* at 11.

49 *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1529 (D.C. Cir. 1994).

proceedings,[51] in this case the legislative hearings were explicitly referenced and cited as a basis of the decision. Staff of the NH PUC was called to testify before the legislature on four separate occasions. The Telecommunications Oversight Committee indicated that the sole reason for these hearings was because of the "failure of parties" to reach an agreement with Verizon regarding its Section 271 application.[52] The Committee challenged the right of CLECs to "negotiate UNI [sic] rates."[53] The Committee chastised the NH PUC for "asking for a reduction in these established rates without due process and implying these rates are excessive, is an unfavorable reflection on the recent commission findings" and found its recommendations to be "not appropriate."[54] The NH PUC was told that:

> It is up to you. Based on my discussions on 04/29/02 with Verizon, if this unique and restrictive decision is not modified, New Hampshire will be put at the back of the list behind all other states in the Verizon market if they decide to compete in New Hampshire at all.[55]

Verizon contends that the PUC was not required by the state legislature to take into account any irrelevant considerations.[56] The above statement by the Telecommunications Oversight Committee demonstrates unequivocally that its actions were motivated by not only an irrelevant consideration for Section 271 purposes, but an improper one. The Telecommunications Oversight Committee was concerned that Verizon would punish New Hampshire for failure to support its Section 271 authority by either putting New Hampshire at the "back of the list" of states or by deciding not to compete at all. This concern was based on what Verizon had

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50 *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966).

51 *ATX*, 41 F.3d at 1529.

52 BayRing App. A, Tab 22, May 2, 2002 Letter of Representative John H. Thomas, Chairman, Telecommunications Oversight Committee to Commissioners, New Hampshire Public Utility Commission ("*May 2nd Legislature Letter*").

53 *Id.* CLECs had no desire to negotiate the rates. In fact, all they wished was for the NH PUC to implement its findings. The "negotiation" was forced upon the CLECs.

54 *Id.*

55 This certainly undercuts Verizon's claim that is was fueled by the spirit of "compromise."

56 *Verizon August 5th Letter* at 10-11.

communicated to the committee. The Telecommunications Oversight Committee clearly dictated to the NH PUC not only that it base its decision on this consideration, but that it should modify the decision based on this consideration. Congress intended for Section 271 authority to be a reward for RBOCs that opened their markets to competition; it was not intended to be the product of threats.

In its May 20th letter, the Telecommunications Oversight Committee proceeded to interpret FCC precedent for the NH PUC and stated "we would expect the PUC to accelerate the application process and allow Verizon to move forward."[57] Thus, there can be no doubt that the legislature not only sought to influence the outcome of the NH PUC's proceeding, but sought to dictate the outcome as well. The statements of the Commissioners on June 14, 2002 indicate that they were successful. There can be no doubt that improper legislative pressure led to this decision, and the Commission should not accord any type of deference to the June 14th determination.

III. VERIZON'S COLLOCATION POWER PRICING IS VIOLATIVE OF CHECKLIST ITEM 1 AND IS NOT IN THE PUBLIC INTEREST

In its Comments, BayRing noted the continuing uncertainty as to collocation power pricing which heretofore has served as a significant barrier to entry in the state of New Hampshire.[58] BayRing would like to clarify that collocation power pricing would more accurately fall under Checklist Item 1. Section 271(c)(2)(B)(i) of the Act requires that a Regional Bell Operating Company ("RBOC"), including Verizon, seeking authority to provide in-region interLATA services, must provide interconnection arrangements in accordance with the

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[57] BayRing App. A, Tab 22, May 20, 2002 Letter of Representative John H. Thomas, Chairman, Telecommunications Oversight Committee to Commissioners, New Hampshire Public Utility Commission ("*May 20th Legislature Letter*")

[58] *BayRing Comments* at 27-28.

requirements of Sections 251(c)(2), 252(d)(2), and 251(c)(6).[59] Competitive Checklist Item 1 thus requires Verizon to provide carriers access to interconnection at least equal to that it provides to itself or to other carriers,[60] including making available to other carriers interconnection agreements to which it is a party at the same rates, terms and conditions.[61] This Commission's pricing rules require that "in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC."[62] Until the uncertainty is resolved in regard to Verizon's collocation power rates there can be no finding that Verizon is providing collocation at TELRIC prices. As BayRing noted in its price squeeze analysis in its Comments, collocation costs are a significant factor in its ability to serve customers.[63] Until BayRing, and other CLECs, can be assured that there will be no return to Verizon's exorbitant collocation power charges, the uncertainty coupled with the existing price squeeze will further delay the introduction of competition in the residential market. The uncertainty in regard to collocation power rates is, therefore, a further indication of why Verizon's application is not in the public interest.

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59 47 U.S.C. § 271(c)(2)(B)(i) ("Competitive Checklist Item 1").

60 47 U.S.C. § 251(c)(2).

61 *See* 47 U.S.C. § 252(i).

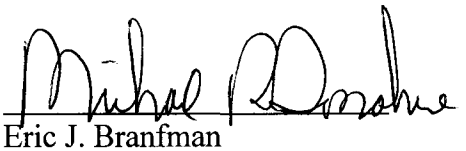
62 *SBC KS/OK 271 Order* at ¶ 236.

63 *BayRing Comments* at 55.

IV. CONCLUSION

For the foregoing reasons, and those raised in its Comments, BayRing respectfully requests that the Commission deny Verizon's application for Authorization to Provide In-Region, InterLATA Services in New Hampshire.

Respectfully submitted,



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